IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 897 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KHAKHABHAI @ JITUBHAI ARJANBHAI
Versus
STATE OF GUJARAT

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Appearance :
MR YOGESH S LAKHANI for Appellant
MR HM PRACHCHHAK APP for Respondent

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE J.R.VORA
Date : 20 & 21/03/2006

ORAL JUDGMENT : **(Per : MR.JUSTICE J.R.VORA)**

1 The instant Appeal is preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 and is directed against the judgment and

order dated 22nd of August, 2000, delivered by learned Additional Sessions Judge, Junagadh, in Session Cases No. 187 of 1997 and 135 of 1997, whereby the present appellant came to be convicted for the offence punishable under Section 302 and is sentenced to undergo life imprisonment and fine of Rs. 1,000/- in default to undergo RI for s ix months.

2 As per the facts leading to both the Sessions Cases deceased in the incident is one Vinay Ramniklal, Son of Ramnikbhai Desabhai. Ramanikbhai Desabhai had four sons, named as, Jagadish, Manish, Vinay (deceased) and Ketan. On 9th of May, 1997, deceased Vinay proceeded out of the house of his father situated in Vruj Society at Junagadh. Vinay was all alone. On the same day, youngest son of Ramniklal named as Ketan also had been out for doing labour work of painting and he departed at about 8.00 a.m. on cycle. He reached at Kalva Chowk, but he did not get labour work, so he was returning to his house on cycle. At about 9.30 a.m. he reached near Ramnivas where Royalty Naka is situated. Near Royalty Naka number of stalls and cabins are situated. Ketan noticed that his brother Vinay was standing near one stall of sugarcane juice. Ketan started going towards Vinay. At the same time, a rickshaw came there from Dhararnagar and halted near Royalty Naka. Out of the rickshaw, present appellant alighted with a piece of iron rod in his hand. The appellant gave a blow of iron rod on the head of Vinay and thereupon Vinay fell down on the ground. Ketan noticed that appellant thereafter took out a knife from his pant and inflicted two blows of knife on the body of Vinay. Ketan was frightened and anticipated

that he would also be beaten by the appellant and, therefore, he did not dare to intervene. The other accused Shantaben was sitting in rickshaw. Thereafter, appellant boarded the said rickshaw and the rickshaw was driven ahead of Royalty Naka. Ketan thereafter came to his house and conveyed to his father Ramanikbhai Desabhai that somebody had beaten Vinay and that his father should immediately go to that place i.e. at Ramnivas. Thereupon, Ramanikbhai Desabhai and his wife Jayaben came near Ramnivas chowk, but they did not find their son. They inquired from nearby shop owners and learnt that Vinay was taken to government hospital. Thereafter Ramanikbhai and Jayaben both went to government hospital and found that Vinay had already died. They noticed that Vinay had in all four blows on his body i.e. on chest, on sides and on head. Before the incident, deceased Vinay was staying with other accused Shantaben since long at Dhararnagar. Deceased Vinay had returned to his father's house only two/three days before the incident. Vinay was threatened by Shantaben and, therefore, he left the house of Shantaben. Vinay had applied for lone of Rs. 25,000/- for centering works from Bank of Baroda and a cheque from the bank was issued in the name of Vinay. Shantaben, the other accused, attempted to take away the said amount of Rs.25,000/- which Vinay refused and, therefore, Shantaben had threatened Vinay.

3 After the incident, one Constable Champraj Najbhai of Gandhigram Police Chowky of Junagadh, when he was going out for household work from his residential quarter situated near the incident, found a crowd gathered near the stall of sugarcane juice. At about 9.45

a.m. Champraj noticed that one male person was lying on the ground and was flouncing and fluttering. The said person was not in a position to sit. Champraj recognised him to be Vinay Ramanikbhai, a resident of Junagadh. Champraj also noticed that Vinay was bleeding from the injuries he received on chest and abdomen. On inquiry at the spot, Champraj came to know that in one rickshaw accused Shantaben and one unknown person aged about 32/35 years had come and unknown person had iron rod as well as knife in his hand. With the help of Police Constable Vujlalbhai Hirabhai, Champraj Najbhai, in one rickshaw, took Vinay Ramaniklal to government hospital at Junagadh, where after examination, Doctors of the hospital declared him as brought dead. Champraj informed Junagadh Police Station Officer Mr. Sharma orally about this incident. In the meanwhile, Mr. R.G. Barot, duty Head Constable of Junagadh Hospital, vide D.O. Letter No. 1306/97 informed Junagadh City Police Station about the fact that the body of Vinay Ramaniklal had been brought to Junagadh Hospital and he had been declared dead. Parsotam Hiranand Sharma, Police Station Officer, received said DO letter at 10.45 a.m. and recorded the same in Police Station Diary. He informed In-charge P.I. Mr. Pandya about the incident and entrusted the investigation to him. On receiving this information, In-charge P.I. reached at Junagadh Hospital and visited OPD ward. He found that the dead body of Vinay was lying in the said ward and the father of the deceased i.e. Ramanikbhai Desabhai was present. Thereupon, P.I. Pandya recorded complaint of Ramanikbhai Desabhai at about 11.10 a.m. which was registered as Crime Register No. I - 156/97 at Junagadh City `A' Division Police Station for the offences punishable

under Sections 302 and 34 of the IPC and under Section 135 of the Bombay Police Act. In the complaint, Ramanikbhai narrated that he had been informed by his youngest son Ketan to reach at Ramnivas Chowk where Vinay was beaten and, therefore, he reached first at Ramnivas Chowk and thereafter in the hospital and found that Vinay was brought dead in the Hospital. Ramanikbhai named accused Shantaben in the complaint while appellant was described as unknown person.

4 On offences being registered, as aforesaid, P.I. Mr. Pandya undertook investigation and dead body was forwarded to Medical Officer for postmortem. He drew a panchnama of place of offence as shown by witness Jayesh Bhupatbhai in the presence of panchas and inquest panchnama had also been drawn. Thereafter, Investigating Officer Mr. Chandulal Popatlal Pandya recorded the statements of Jayesh Bhupatbhai and Bhupatbhai Bhimabhai, who had their stalls near the place of incident. On 10th of May, 1987, Mr. Pandya, recorded further statements of complainant Ramanikbhai Desabhai and other witnesses, who appeared to be acquainted with the facts of the incident. Since he was in-charge PI, he thereafter entrusted the investigation to regular P.I. of that Police Station Mr. Nirmalsinh Kalyansinh Gohil, on May 12, 1997, who seized the clothes of deceased, which the deceased was wearing at the time of incident. Thereafter, attempts were made to arrest the accused and on information being received, present appellant was arrested on May 22, 1997 at about 11.15 a.m. A panchnama of arrest was drawn by I.O. During investigation, present appellant volunteered to show the place where iron rod as well as knife were put and vide

panchnama one iron rod and a knife with sheath were recovered. Thereafter, on September 19, 1997, a raid under the Prevention of Gambling Act was arranged at Ambedkar Nagar at the house of Khima Desar Harijan and from there the other accused Shantaben was found and she was arrested in this crime.

5 Present appellant was arrested earlier and, therefore, a charge sheet was submitted against him in the court of learned Chief Judicial Magistrate, First Class, at Junagadh, which was numbered as Criminal Case No. 3725 of 1997. The said criminal case against the present appellant was committed to the Court of Sessions on August 19, 1997 and was numbered as Sessions Case No. 135 of 1997. Thereafter, on arrest of the other accused i.e. Shantaben, another charge sheet against her also was submitted in the court of learned Chief Judicial Magistrate, Junagadh, and said case was registered as Criminal Case No. 4644/97 and the said criminal case also came to be committed to the Court of Sessions as only the Court of Sessions was competent to try the case and said case was registered as Sessions Case No. 187 of 1997.

6 Thereafter, the learned Sessions Judge framed the charge against accused Shantaben, vide Exh. 2 on September 25 of 1998 and thereafter also framed charge against present appellant on July 06, 1999 for the offences punishable under Section 302 read with Section 34 of IPC and for the offences punishable under Section 135 of Bombay Police Act. Both the accused pleaded not guilty to the above said charges. In both the Sessions Cases, the State moved an application stating that

both the sessions cases had arisen from same crime register number and from same incident and, therefore, both the Sessions Cases shall be tried together. Learned Sessions Judge granted the request of the State and directed that both the Sessions Cases i.e. Sessions Case No. 135/97 as well as Sessions Case No. 187 of 1997 be tried together and common evidence be recorded in Sessions Case No. 135 of 1997.

7 The prosecution examined : (1) Dr. Suresh Dhirajlal Pandia, as PW-1 at Exh.17; (2) Ramnikbhai Desabhai, Complainant, as PW-2 at Exh. 19; (3) Jayaben Ramniklal, mother of the deceased as PW-3 at Exh. 22; (4) Manish Ramniklal, brother of the deceased, as PW-4 at Exh. 23; (5) Ketan Ramniklal, brother of deceased , as PW-5, at Exh. 25; (6) Bhupatbhai Bhikhabhai, as PW-6, at Exh. 26; (7) Osman Alibhai, as PW-7, at Exh. 27; (8) Ruturaj Girdharlal, as PW-8, at Exh. 28; (9) Khima Naga, panch, as PW-9, at Exh. 29; (10) Dayalal Nathalal, as PW-10, at Exh. 31; (11) Dhiraj Ranjibhai, as PW-11, at Exh. 33; (12) Jayesh Bhupatbhai, as PW-12, at Exh. 36; (13) Amin Ajitbhai, as PW-13, at Exh. 37; (14) Parsotam Hiranand Sharma, as PW-14, at Exh. 38; (15) Champraj Najbhai, as PW-15, at Exh. 43; (16) Vrajlal Devsibhai, as PW-16, at Exh. 50; (17) Chandulal Popatlal Pandya, as PW-17, at Exh.60 and (18) Nirmalsinh Kalyansinh Gohil, PI and second Investigating Officer, as PW-18, at Exh. 63, to prove its case against the appellant.

8 The prosecution also tendered documentary evidence to prove its case like Postmortem Report at Exh. 18, Complaint i.e. F.I.R. at Exh. 20, discovery panchnama of weapons in respect of present appellant

at Exh. 30, arrest panchnama in respect of appellant at Exh. 32, panchnama of place of offence at Exh. 34, inquest panchnama at Exh. 35, copy of entry made in Police Station Diary on 9th of May,1997 at Exh. 39, letter forwarded by duty Constable at hospital to police station at Exh. 40, seizure of blood of the deceased and the clothes, panchnama at Exh. 44 and report of the Forensic Science Laboratory at Exhibits 48 and 49.

9 Accused Shantaben, on evidence of prosecution being over, examined four defence witnesses to establish her plea of alibi, but that fact is not material for this Appeal. When the circumstances appearing against the present appellant were put to him while recording his further statement, he denied the evidence placed on record and filed the written explanation at Exh. 3 wherein he stated that he was physically handicapped to the extent of 45% disability and that he had not committed any offence. He further stated that there was no evidence in respect of his identification as the person who was involved in the crime. At Exhibit – 3/1 he submitted a xerox copy of the certificate of Doctors of Junagadh Hospital in support of his defence.

10 Both the learned Advocates of the accused as well as learned Public Prosecutor were heard at length by learned Sessions Judge and after appreciating the evidence on record, the learned Sessions Judge came to the conclusion that role played by Shantaben as disclosed during appreciation of evidence indicated that at the most she was sitting in the rickshaw and, therefore, learned Sessions Judge came to the conclusion that she was entitled to acquittal as prosecution failed to prove the case

beyond doubt against her. While considering the evidence against the present appellant and more particularly having appreciated the evidence of PW-5 Ketan Ramaniklal at Exh. 25, the learned Trial Judge came to the conclusion that there was no reason at all to disbelieve this witness of tender age, who acted in natural manner and depicted the incident correctly before the court, which inspired confidence. The learned Trial Judge in detail appreciated and scanned the evidence of the only eye witness and found that he was also corroborated by other evidence like recovery of weapons from the present appellant etc. Therefore learned Sessions Judge came to the conclusion that the case against present appellant was proved beyond reasonable doubt.

11 Thus, by common judgment delivered in two Sessions Cases, the learned Sessions Judge, Junagadh, acquitted accused Shantaben and convicted present appellant in Sessions Cases No. 187/97 and 135/97, as aforesaid.

12 The State Government has not preferred any Appeal against the acquittal of accused Shantaben while the present Appeal is preferred by accused - appellant against his conviction, as aforesaid.

13 Learned Counsel Mr. Y.S. Lakhani for the appellant submitted that Ketan Ramanikbhai is the only eye witness of the incident and he is a chance witness. According to him, Ketan is a related witness and was interested to implicate appellant. It was contended that it is improbable that Ketan, as per the prosecution case, he knew appellant but did not

disclose the name of appellant before his father Ramanikbhai Desabhai when on the say of Ketan, Ramanikbhai Desabhai went to the place of offence and thereafter to the hospital. It was contended that Ketan kept silent till the evening about the details of the incident and did not disclose the name of the appellant before anybody and suddenly he disclosed the name of appellant as accused No.2 as participant in the incident only on the next day before police. It was contended that the conduct of Ketan becomes doubtful and he being related, interested and chance witness, ought not to have been believed by the learned Sessions Judge. It was contended that the conduct of the witness Ketan is otherwise also doubtful that he did not intervene on witnessing his brother being beaten and ran away from the spot to his house. It was contended that the question of Ketan being afraid of appellant did not arise as Ketan himself deposed that there was no fear, once the appellant left the place of offence. It was vehemently, therefore, urged that Ketan is a got up witness and deposed only to falsely implicate present appellant in this crime, and no reliance can be placed on his evidence. It was contended that the whole prosecution case hinges on sole testimony of Ketan, as other witnesses, who were shop owners at the locality where the incident took place, did not support the prosecution case.

13.1 Next it was contended that the appellant is physically handicapped and disabled to the extent of 45% as stated by the appellant in his further statement under Section 313 of the Code of Criminal Procedure and therefore he could not have assaulted the deceased. It was

contended that he produced copy of required certificate on record in his above said further statement. It was contended that the appellant has a big family of four minor children and without any cogent evidence, he has been falsely implicated in the present crime. It is contended that it is amply disclosed during the course of evidence that there was previous enmity between deceased Vinay and the present appellant. It was contended that admittedly deceased was staying with Shantaben for considerable long period. There was earlier quarrel between the deceased and appellant No.2 which is on record. It was, therefore, contended that this prior enmity prompted the related witnesses to falsely implicate appellant in this crime though he is totally innocent.

13.2 Next it was contended that as disclosed by the prosecution case, it appears that Shantaben was root cause of the incident, and at the instance of Shantaben, as alleged, appellant had given blow and caused fatal injuries to the deceased. It was alleged that Shantaben was accompanying appellant at the place of offence, but the learned Trial Judge considering the same evidence has not believed the presence of accused Shantaben at the scene of offence and ruled out common intention amongst two accused and, therefore, when case against accused Shantaben was not believed by the Trial Judge, placing reliance on the same evidence, appellant ought not to have been convicted by the Trial Court.

13.3 It was next contended that medical evidence adduced by the prosecution including oral evidence of sole eye witness is at variance as the prosecution theory of giving iron rod blows to the victim by the appellant is not supported by the medical evidence because the deceased had in all five injuries and all were incised wounds and could not have been inflicted by the blows of iron rod. It was, therefore, contended that on this count also the presence of the eye witness at the place of incident becomes doubtful so as to destroy the prosecution case against the present appellant.

13.4 It was contended that identity of the accused could not be established beyond reasonable doubt. It was contended that star witness Ketan who already knew the appellant did not disclose his participation in crime till evening of the incident before his relatives and on next day before police. Learned Counsel for the appellant drew attention of this Court to the fact that other five witnesses who were alleged to be eye witnesses did not support the prosecution case. These witnesses are shop owners and one Clerk of Royalty Naka situated near the place of incident. It was contended by learned counsel for the appellant that learned APP was granted permission by the Trial Court to cross-examine these witnesses as they did not

support the prosecution case. Learned Counsel also drew the attention of this Court towards cross-examination of learned APP and stated that the original prosecution case as disclosed thereby wherein in the statements recorded on May 09, 1997, the names of appellant was not disclosed by these witnesses before police. It was contended that the appellant was referred to as an unknown person by the witnesses and only on the next day when a statement of Ketan was recorded by police, the further statement of above said witnesses came to be recorded by the police wherein these witnesses stated that the said unknown person was appellant herein. It was contended that in these circumstances when initially it was reported to the police by the eye witnesses that some unknown person participated in the crime, it was the duty of the Investigating Agency to hold test identification parade, which was not done. It was contended that though none of the said witnesses supported the prosecution case, but the fact be noted is that the name of the appellant was disclosed before the police only on the next day in further statements of the said witnesses recorded by police after the statement of Ketan was recorded. It was contended that therefore the prosecution case becomes doubtful on this point also.

13.5 It was next contended that discovery panchnama alleged to have been drawn by Investigating Officer could

not be proved beyond doubt as the panch examined did not support the prosecution case. It was submitted that as per the Forensic Science Laboratory, the group of the blood on iron rod as well as on knife, could not be determined. It was, therefore, contended that this Forensic Science opinion also is not corroborating the prosecution case.

13.6 Next it was contended that subsequent conduct of the present appellant indicates his innocence. It was submitted that it is not the prosecution case that the present appellant had fled after the incident and in fact the appellant was found from his house on May 22, 1997, but nothing incriminating was found from him while he was arrested on May 22, 1997 from his own house at Ambedkarnagar, and if the appellant had participated in the crime, he would not have been available to the police so easily from his own house. It was, therefore, contended that the circumstance of his arrest indicates his subsequent conduct which establishes to his innocence. It was then contended that as admitted by prosecution witness i.e. second Investigating Officer PW-18 Mr. N.K. Gohil that deceased was involved in criminal cases of inflicting injuries as well as in a murder case as well and was detained under PASA and therefore the deceased had many enemies, leading to the probability that due to enmity the deceased might have been done to death by his other enemies

but only through the testimony of witness Ketan, due to previous enmity the appellant is falsely implicated in this crime.

13.7 Attention of this Court was also drawn to certain contradictions in the deposition of the witnesses, especially in the deposition of Ramnikbhai, Jayaben and Manish. It was contended that after the incident, there are two versions about escaping of appellant. One version is, the appellant went away on foot while the other version which is narrated by Ketan is about escaping of appellant in rickshaw along with Shantaben. It was contended that these two versions are contradictory and affects adversely the prosecution case. It was also contended that there are contradictions in the evidence in respect of the loan applied for by the deceased for which there was quarrel between Shantaben and the deceased and these contradictions, which according to learned counsel for the appellant, are proved, destroy the motive of the prosecution case. In this regard attention of this Court was also drawn to the deposition of Investigating Officer.

13.8 It was also contended that an important witness i.e. rickshaw driver, in whose rickshaw, according to the prosecution case, appellant as well as Shantaben were brought to the place of incident, is not examined. This

rickshaw driver is material witness. Non-examination of such rickshaw driver adversely affects the prosecution case.

13.9 It is contended by learned Counsel for the appellant that in the First Information Report filed by Ramnikbhai, name of Shantaben appears as accused while in his deposition before the court, Ramanikbhai stated that Ketan conveyed to him that somebody had beaten Vinay. It was further contended that the source available to Ramanikbhai was Ketan, who had not disclosed the names of the accused, but it is not explained as to how the name of accused – Shantaben appeared in the First Information Report, as alleged by Ramanikbhai. It is contended that this fact is creating doubt about prosecution case and manipulation on the part of prosecution witnesses.

13.10 Learned Counsel for the appellant relied upon certain decisions of the Supreme Court and High Court. In the matter of SHANKARLAL vs. STATE OF RAJASTHAN, as reported in AIR 2004 SC 3559, relying upon the facts of the case and claiming comparison with the present case, it was contended that in the said case before the Supreme Court, solitary eye witness was not believed by the Apex Court. Like wise, in the matter of STATE OF ORISSA VS. MR BRAHMANANDA NANDA, as reported in 1976 Cri. L.J. 1985

(S.C.), the Apex Court for the facts stated therein, did not rely upon the explanation offered by the witness for late disclosure of the names of the accused. Like wise, on similar points on facts, learned Counsel for the appellant relied upon the following decisions (i) in the matter of RAMJI SURJYA vs. STATE OF MAHARASHTRA, as reported in AIR 1983 SC 810; (ii) in the matter of SHANKAR SINGH vs. STATE OF UTTAR PRADESH, as reported in 2003 Cri. LJ 1095 (Allahabad High Court) and in the matter of VALKUBHAI RAMBHAI KATHI vs. THE STATE OF GUJARAT, as reported in 1998 (2) GLH 846. It was ultimately contended that for the above mentioned reasons, the prosecution failed to prove charges against the appellant beyond reasonable doubt and the trial judge ought to have acquitted the present appellant. It was submitted that the present appeal be allowed and the judgment of convicting and sentencing appellant be set aside by acquitting appellant from the charges levelled against him.

14 As against the arguments advanced by learned counsel for the appellant, learned APP Mr. H.M. Prachchhak, contended that though the case of prosecution rests on sole eye witness i.e. Ketan, as other eye witnesses did not support the prosecution case, but the testimony of sole eye witness Ketan cannot be simply brushed aside only on the ground that he is a related witness. In support of this submission, the learned APP relied upon a decision of the Apex Court in the matter of BANTI alias

GUDDU vs. STATE OF MADHYA PRADESH, as reported in AIR 2004 SC 261. It was contended that at the most when witness is related, his evidence be carefully scrutinized, but it is not the law that his evidence should not be believed. On this ground, it was contended that Ketan had withstood careful cross-examination of learned counsels of both the accused and nothing could be elicited as to why Ketan would falsely implicate appellant in the heinous crime of murder. No animosity or enmity could be shown by the defence between the appellant and witness Ketan. It was submitted that the trial court has scrutinized the evidence of Ketan in aforesaid manner and as the trial court had an opportunity to examine the demeanour of the witness, the conclusion that his evidence was inspiring confidence, shall be upheld by this Court. It was also contended that only because Ketan disclosed name of the appellant on the evening of that day before his relatives and on the next day before the Police, would not create any doubt in the prosecution case nor would it render his say untrustworthy. It was contended that ordinarily the victim would not allow to get real culprits scot-free and implicate other persons falsely. It was contended that false implication could be probablized by cogent reasons and no such reason could be brought on record by the defence.

14.1 It was contended that the appellant could not prove that he was handicapped to the extent that he could not have participated in the crime. It was submitted that the xerox copy of the medical certificate placed on record by appellant was not proved by the defence. The certificate was mere a xerox copy and could not be considered unless proved in legal manner. Learned APP contended that no facts of his

disability came to be noted in his arrest panchnama placed at Exh.32. It was, therefore, contended that the argument advanced on behalf of the appellant that the appellant was falsely implicated and that he was not capable of participating in crime, is without any merit.

14.2 It was contended by learned APP that the case against accused Shantaben who was acquitted by the trial court and the case against the present appellant are based on different footing and both were attributed altogether different roles and therefore only because accused Shantaben is acquitted by the Trial Court, it could not be contended that the present appellant is also required to be acquitted. It was submitted that learned Trial Judge appreciated the evidence against Shantaben as well the evidence of alibi placed on record by her through examining the defence witnesses and after appreciating and considering the case against Shantaben, she came to be acquitted by the learned Trial Judge, while the evidence against present appellant was also considered carefully by the learned Trial Judge separately from the case against Shantaben, and the learned Trial Judge came to the conclusion that, the present appellant was liable to be convicted. It was contended that since the cases of both the accused rests on different facts, acquittal of one accused, could not result in acquittal of the other accused. It is, therefore, contended that there is no merit in such a contention.

14.3 It was next contended by learned APP that there is no such discrepancies between the medical evidence and oral evidence as has

been advanced by the appellant. It is submitted that oral evidence discloses knife injuries on the body of the victim and fully supported by the medical evidence, and that those injuries inflicted by knife proved to be fatal. It was contended that, therefore, as such, there is no conflict or discrepancy between the oral and medical evidence. Only because the Doctor failed to notice or describe iron rod injuries, it cannot be said that the knife injuries which are disclosed by oral evidence, as supported by medical evidence, should be disbelieved.

14.4 It was contended by learned APP that eye witness Ketan knew the appellant as well as Shantaben. The investigation, as was undertaken, did not necessitate holding of any test identification parade and failure to hold test identification parade, cannot be regarded as fatal to the prosecution case.

14.5 It was contended by learned APP further that the evidence of the sole eye witness Mr. Ketan is trustworthy in character and there is no reason to discard such a weighty evidence. It is contended that though recovery of weapons is not supported by panch witness, but the recovery is proved through Investigating Officer, wherein the Investigating Officer recovered iron rod and knife with blood stains and though the opinion of Forensic Science Laboratory placed on record indicates that the group of such blood stains could not be determined, but the recovery of weapons and having blood stains on such weapons is a corroborative evidence supporting the evidence of eye witness Ketan. It was contended that subsequent conduct of an accused is

hardly relevant when there is direct evidence to prove a case against such accused. Disbelieving such direct evidence, no presumption can be drawn that the appellant was arrested easily from his house, and that his subsequent conduct indicated his innocence, and that the victim was of a character that there were many criminal cases registered against him including a murder case and having many enemies, which leads to a probability that the victim might have been done to death by one of his enemies. It was, therefore, contended that prosecution was able to prove case against the appellant beyond reasonable doubt, and the Trial Court after appreciating fully the evidence on record, rightly convicted and sentenced the appellant. It was, therefore, contended that the Appeal be dismissed accordingly.

15 This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to the broad and reasonable probability of the case.

16 True it is that, the prosecution case rests on sole eye witness PW-5 Ketan Ramaniklal, Exh.25, though during investigation, it was revealed that the incident was witnessed by shop keepers and cabin owners of the locality where the incident took place, but those witnesses did not support the prosecution case. Therefore, it is necessary to note here that the cluster of following witnesses, who were independent eye witnesses of the locality, but did not support the prosecution case. Those witnesses are (i) Bhupat Bhikhabhai, PW-6 Exh. 26; (ii) Osman

Alibhai, PW-7, Exh. 27; (iii) Ruturaj Girdharlal, PW-8, Exh. 28, who was a Clerk attending Royalty Naka; (iv) Jayesh Bhupatbhai, PW-12, Exh. 36 and (v) Amin Ajitbhai, PW-13, Exh. 37. All these witnesses turned hostile to the prosecution and learned APP confronted each of these witnesses with their version before the police. This evidence confronting of witness with his police statement is not a substantive evidence and cannot be relied upon. Therefore, the contention that from the prosecution case, which is disclosed from the cross-examination of learned APP of such witnesses, it was necessary that test identification parade ought to have been held by investigating agency, is without any merit. The evidence of hostile witnesses may not be discarded in toto and can be relied upon only to the extent it corroborates the prosecution case. Appreciating the evidence of this cluster of witnesses, the prosecution case gets the corroboration to the extent that the incident did take place at the time and place at which prosecution claims. Except that, the evidence of these witnesses could not be useful to any of the sides.

17 The important evidence is the evidence of four witnesses related to the victim, and out of them, only one is eye witness. Those witnesses are (i) Ramnikbhai Desabhai, PW-2, Exh.19, father of the deceased; (ii) Jayaben Ramniklal, PW-3, Exh. 22, mother of the deceased; (iii) Manish Ramniklal, PW-4, Exh. 23, brother of the deceased, and (iv) Ketan Ramniklal, PW-5, Exh. 25, brother of the deceased and sole eye witness. The evidence of these witnesses is required to be appreciated as a cluster of witnesses. Ramnikbhai, in his deposition, at Exh. 19, stated that the incident occurred on 9th of May, 1997. On that day, deceased Vinay had

proceeded out of his house at 8.00 a.m. all alone. He was staying with Shantaben for considerable long time and before two or three days of the incident, he had resumed his house. The witness states that on account of the amount of loan, which had been granted to Vinay, there had been a quarrel amongst Shantaben and Vinay and accused Shantaben wanted to usurp the amount of loan of Rs. 25,000/- and Vinay had refused and had left the house of Shantaben and had started living with him. It is further stated by him that on that day, his son Ketan was doing labour work and had gone out for his work and had returned to the house at about 11.00 a.m. and had conveyed that at Ramnivas Chowk, somebody had beaten Vinay. Thereupon he and his wife visited Ramnivas Chowk and had learnt from shop keepers that Vinay had been shifted to hospital. Thereafter, he visited hospital and had found that his son Vinay had been brought dead to the hospital. After recording of complaint by P.I., the dead body of Vinay was sent for postmortem examination and thereafter the dead body of Vinay was entrusted to him for cremation. After cremation, all of them returned at about 6.00 p.m. at his house when Ketan conveyed that the appellant inflicted knife blows on the person of Vinay and Shantaben was sitting in rickshaw. Ramnikbhai produced on record his complaint recorded by P.I. at Exhibit-20. He was cross-examined by both the learned Advocates for both the accused especially on the aspect about loan transaction and on the aspect that Vinay had been staying with Shantaben and which they had not liked. An attempt was also made to show that Ramnivas Chowk was not situated on way from Kalva chowk leading to the house of witness. It was also suggested that the way from Kalva Chowk to his house was through Sisumangal,

to which the witness emphatically denied. He has been contradicted with minor contradictions with the First Information Report. In cross-examination on behalf of the appellant, he was asked that whether Vinay had been doing any work. The witness replied that he did not know that whether Vinay had been doing anything. He denied that he knew that the case was registered against Vinay for the offence under Section 307 of the IPC. He stated that he did not know that an incident had taken place between appellant and deceased Vinu, in which the deceased had inflicted knife blows on appellant and in the said case accused Shantaben was also an accused. He denied the knowledge about arrest of the deceased in the said case, though he stated that for the last three days, the deceased was at this home and during that time police had come to his house to arrest the deceased. He denied that the deceased was involved in many crimes. He stated that after reaching to the hospital, after an hour, his complaint was recorded by the police. He denied that his son Ketan was all throughout till 5.00 p.m. was with him. In the evening after cremation of deceased when they reached at their house, he was accompanied by other person to his house. He stated that at crematorium, Ketan was not present. He was confronted with the contradictions in his further statement before the police about the dispute between deceased and Shantaben about receiving amount of loan. He admitted that the deceased was detained under PASA. He emphatically denied that Ketan did not convey the details of the incident to him. He denied that he had falsely implicated appellant in this crime. That's all broadly transpires from the evidence of the complainant. While PW-3 Jayaben Ramniklal and PW-4 Manish Ramniklal at Exhibits 22 and 23 stated that at about 11.00 a.m.

Ketan returned home and conveyed that Vinu was beaten. Witness Manish Ramaniklal had been to his labour work and he came to know about the incident in the afternoon. Both these witnesses are not the eye witnesses though both of them have been cross-examined in detail.

18 Vital evidence is of Ketanbhai, recorded at Exh. 25 as PW-5 on 30th of November, 1999. He stated that his father is Ramniklal, they are four brothers, one of them is died. Name of the eldest is Jagadish, younger to Jagadish is Manish. Deceased was younger to Manish and he is the youngest. Jagadish was a teacher at Talala. Remaining three brothers were staying in Junagadh and were doing labour work. The incident took place before one and half years on May 09, 1997. On that day, according to witness, he had been to Kalva, where all labourers get together at about 8.00 a.m. He had gone to Kalva on cycle. He did not get work and, therefore, he had been returning to his house. He reached near Ramnivas and Royalty Naka at about 9.30 a.m. Cabins were situated near Royalty Naka. He witnessed that his brother Vinay had been standing near cabin of sugarcane juice. He started going towards his brother. At that time, one rickshaw came from Royalty Naka and halted. Appellant alighted from the rickshaw and he was having an iron rod in his hand. After alighting from rickshaw, he inflicted a blow with iron rod on the head of his brother Vinay. On account of this blow, his brother had fallen on the ground. Thereafter, appellant took out a knife from his pant and inflicted two blows of knife on the body of his brother. He was frightened and apprehended that the appellant would also beat him, therefore, he did not intervene. Shantaben was sitting in the

rickshaw which was halted. Thereafter, the appellant boarded in the said rickshaw and the said rickshaw was driven beyond Royalty Naka. Thereafter, he came straightaway to his house on cycle. He stated to his mother and father about the incident. He stated that Vinay was beaten, but did not disclose the name of assailant. His parents thereafter went to hospital and he remained at his house. He stated that he was frightened and, therefore, he did not disclose the names of assailants before his parents. He further contended that at about 3.30 dead body of his brother Vinay was brought to his house after postmortem. Thereafter the dead body was taken for cremation. He remained at his house. When everybody went for cremation he was all alone in the house. A vehicle of police had come and his statement was recorded. Witness further stated that his father returned from crematorium at 7.30 p.m. At that time he disclosed the names of assailants and further details of the incident. Before two/three months, appellant No.2 and deceased Vinay had a quarrel, and on account of which, deceased Vinay had sustained fractures. According to witness, Vinay was treated at Rajkot and thereafter he was brought to their house. The witness stated that Vinay was staying with Shantaben and had been to his house two/three days prior to the present incident. Vinay had obtained a loan of Rs. 25,000/- from the bank situated Opposite Bahauddin College. Witness further stated that when Vinay came to his house before two/three days, he was weeping and stated that his loan was sanctioned and Shantaben had been insisting to hand over the amount of loan to her. Witness further stated that Vinay was threatened by Shantaben that, if the amount was not handed over to her, Vinay would be done to death through appellant.

Witness stated that he did not know what happened to the amount of loan after this incident. He stated that his father lodged a complaint and police inquired about the incident from him also. In cross-examination conducted by learned Advocate for Shantaben, witness stated that it was true that, near the cabins of sugarcane juice, other cabins for tea, etc. were situated. He submitted that there was a rickshaw stand near Royalty Naka and many rickshaws were parked there. Ahead of Royalty Naka, office of N.C.C. was situated. Opposite Royalty Naka, near Ramnivas, many government quarters were situated. He denied that near Royalty Naka, many trucks were halted for paying royalties. He denied the fact that the way to his house passed through Bahaudin College road. He voluntarily stated that the way to his house from Kalva Chowk was through Bilkha Road. He admitted that till his father returned from crematorium, he did not say anything about the incident to anybody. He denied that he did not state before the police that Shantaben was sitting in the rickshaw and appellant boarded the same rickshaw, and the said rickshaw was driven beyond Royalty naka. He also denied that he did not state before the police that, before three days of incident, when Vinay came to his house, he was weeping and had stated that, as loan had been sanctioned and Shantaben had insisted to hand over the amount of loan to her or else Vinay would be done to death through appellant. He denied the suggestion that Shantaben had not come to the place in rickshaw and was not sitting in the rickshaw. Thereafter in para-12 he was cross-examined about the presence of Shantaben at the place of incident and the witness was asked about the suggestions in respect of alibi of accused Shantaben. In cross-examination conducted by learned Advocate for the present

appellant, the witness stated that near Ramnivas there was a crossing of four roads. One road leads to Sisumangal and the second road leads to Ramnivas. He admitted that through both the above roads from Kalva Chowk, he could go to his house. He admitted that Royalty naka is not situated on way from Kalva Chowk to his house through Ramnivas or through Sisumangal. He further stated that Royalty Naka had situated on main road leading to Sasan and Bilkha. Heavy traffic remained on this road. He admitted that it was not decided that at which place he was to go for labour work. Even on earlier day of the incident, it was not decided that at which place he was to go for labour work on the next day. He denied the suggestion that on the day when police recorded his statement, it was not decided that at which place, he was to go for labour work. He denied the suggestion that in his statement before the police he did not state that on the day of the incident he had been at Kalva Chowk from his house. He denied the suggestion that he stated falsely that on account of non-availability of work he was returning to his house on the day of the incident. He stated that on the day of the incident when he reached at Kalva Chowk he met with contractor. The name of contractor was Rameshbai. He stayed with Rameshbhai for half an hour. He admitted that in labour work of painting, first contractor decides and thereafter he would be required to go at the place of work. He stated that it takes 15/20 minutes to reach Kalva Chowk from Ramnivas. He further stated that on the day of incident at the traffic point near Royalty naka there was policeman. He noticed passers-by and traffic of vehicles, he wanted to go back to his house. He denied the fact that he was to go home through his usual way through Ramnivas or Sisumangal. While

returning to his house on the day of incident and on noticing his brother, he kept his cycle on stand. He stated that he could not remember the registration number of the rickshaw which came at the place of incident. He denied the suggestion that he did not know the fact that on which part of the body of Vinay, iron rod blow was inflicted by a person, who alighted from the rickshaw. He stated that incident took some time, but he could not say exactly how much minutes the incident lasted. After the incident, crowd was gathered at the place of incident, but he did not know anybody from that crowd. He stated that after reporting the incident to his parents, he came out of the house, but not in company of his parents. He denied that while he was at his house on the day of incident, he came out of his house and talked about the incident around. He further stated that after the incident was over and assailant had gone in rickshaw, he had no fear but he did not dare to go and intervene. He stated that he did not arrange to hire a vehicle immediately and to shift Vinay at Hospital. He denied the suggestion that he did not state before the police that the body of Vinay was brought to his house at 3.30 p.m. He also denied the suggestion that he remained in the house as all family members had gone for cremation and thereafter the police van had come. He denied the suggestion that because he did not know that how Vinay was beaten, he did not give that information to police. He also denied that he did not state before the police that when his father returned in the evening from crematorium, he conveyed the details of incident to his father. He admitted that previously Vinay was not doing anything. He stated his ignorance about whether any other crimes were registered against Vinay. He also pleaded his ignorance about whether Vinay was

absconding from police. He denied the suggestion that he did not state before the police that in a quarrel with the appellant, Vinay had sustained a fracture. He also denied the suggestion that he did not state before the police that before this incident, somebody had inflicted knife blows on Vinay. He emphatically denied that he stated falsely that he was returning to his house at the time of incident on account of non-availability of work. He emphatically denied that on account of deceased being his brother and his father being complainant, he falsely deposed that he witnessed the incident. He emphatically denied that he did not see any incident in which an attack was made on his brother by iron rod and knife. On contradictions being asked about the police statement, he denied that he did not state before the police that "accused Shantaben told that if the amount of loan sanctioned was not handed over to her, he would be done to death." He stated that at the time of incident he shouted, but did not called anybody. He did not go to police and ask for the help. He again emphatically denied that he had not seen the incident. He also replied to a suggestion that before the incident he had no occasion to talk with appellant or had no occasion to quarrel. He emphatically denied that because he was got up witness, he gave information about he incident on the next date.

19 That is all what transpires from the evidence of the sole eye witness Ketan. The evidence of Ketan is required to be scrutinized carefully and taking into consideration all other attending circumstances of the prosecution case.

20 Very important aspect of the prosecution case is that the homicidal death of Vinay is not disputed. According to PW-1 Dr. Suresh Dhirajlal Pandya, at Exh. 17, who conducted postmortem, he found following external injuries on the body of Vinay.

1. I.W. 3 cm x 2 cm x cavity on Rt. Side chest anteriorly just below nipple on 5th intestinal space.

2. I.W. 3 cm x 1 cm x cavity deep on lateral side, right lower part of chest over 8th intestinal space.

3. I.W. 4 cm x 2 cm x bone deep on Rt. parietal region of scalp.

4. I.W. 4 cm x 2 cm x bone deep on occipital region of scalp.

5. I.W. 3 cm x 3 cm x bone deep on occipital region of scalp just Rt. to injury No.4.

The Doctor also found following corresponding internal injuries :

1 I.C. Muscles vessels cut 3 cm x 2 cm on 5th I.C. space anteriorly. Corresponding to external injury No.1.

2 On 8th IC space IC muscles vessels cut corresponding to ext. injury No.2 - size 3 cm x 2 cm.

3 Rt. lung cut size 2 cm on middle to be corresponding to ext. injury No.1.

4 Peritoneum cut corresponding to ext. injury No.2 about 2 lid blood present on peritoneal cavity.

5 Lt lob of liver cut side size 3 cm long deep corresponding to ext. injury No.2.

PW-1 Dr. Suresh Dhirajlal Pandya came to the conclusion from above that the cause of death of Vinay was shock due to extensive haemorrhage and injury to vital organs liver and lung. Thus, the death of deceased Vinay was not accidental and was homicidal death. So far as this conclusion is concerned, the same is not disputed. So far as the occurrence of the

incident is concerned, it is nobody's case that the incident had not taken place, at the time and place at which the prosecution proposes. What is claimed on behalf of the appellant is a claim of false implication on account of enmity and, therefore, much harping is on the credibility of sole eye witness Ketan, from learned Advocate for the appellant.

21 The evidence, therefore, of Ketan is required to be appreciated keeping in mind the above said aspects of the prosecution case that deceased Vinay met with the homicidal death and incident did occur at Ramnivas Chowk.

22 It is not necessary to reiterate the celebrated principle of law that conviction can be based on credit-worthy testimony of sole eye witness. It is known principle of law that it is the quality of the evidence that matters and not the quantity of the evidence. Even a sole eye witness, whose testimony inspires confidence, trial could succeed and many witnesses though examined, but if such evidence is found not credit-worthy, trial may not succeed. This principle is enunciated under Section 134 of the Indian Evidence Act, 1872. Though the testimony of sole eye witness must be carefully scanned to arrive at a decision.

23 The appreciation of evidence is a matter where the court is required to exercise due diligence especially while appreciating the evidence of sole eye witness. The court must bear in mind the set up and the circumstances in which the crime is committed, the quality of evidence, the nature of temperament of the witness, the level of

understanding and power of perception of individual. It must be borne in mind that witnessing the incident is a circumstance, which always differs from one human being to another.

24 Now appreciating the evidence of this witness i.e. Ketan Ramniklal, the main attack from the defence side is made on the conduct of the witness. It was argued that, firstly, the conduct of the witness for not intervening when his brother was attacked and assaulted by knife blows and, secondly, even thereafter not disclosing the names of the assailants till evening, is a conduct unnatural, and not inspiring any confidence at all in the testimony of this witness. When we appreciated the evidence of this witness, it is necessary to take into consideration that, the witness belongs to a downtrodden strata of society and is doing labour work, and secondly, the witness was only 17 years of age when he experienced the incident. The set conduct in given circumstances, cannot be attributed to human being. Different human being reacts in different manner in different circumstances. The Apex Court, therefore in this respect in the matter of RANA PARTAP vs. STATE OF HARYANA, as reported in AIR 1983 SC 680 observed in para – 6 as under :

> " Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his

own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

25 Like wise in the matter of STATE OF UTTAR PRADESH vs. DEVENDRA SINGH, as reported in AIR 2004 SC 3690, in respect of post occurrence conduct of a witness relying upon the above said decisions of Rana Pratap vs. State of Haryana (supra), the Apex Court in para-6 observed as under :

" In view of the rival submissions it has to be first see whether prosecution has established its case. Strictly speaking, the case is not of circumstantial evidence. Human behaviour varies from person to person. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand

rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Some may remain tight-lipped overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending upon variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

26 It is pertinent to note that witness Ketan or his father had no enmity with appellant No.2. Whatever enmity is brought by the defence on record was between appellant and deceased . On the contrary, when the conduct of the witness is examined on the anvil of the judicial scrutiny, it becomes very clear that there is nothing unnatural so far as this witness is concerned in not intervening during the incident and even not disclosing the name of the assailant to his parents till the evening. It must be borne in mind that it was the case of the defence that there was a previous quarrel between the appellant and the deceased. In the said quarrel, it was brought on record that the deceased had sustained fractures. This fact was within the knowledge of the witness, who was only 17 years of age and was doing labour work. Witness, therefore, clearly justified in his apprehension that on his intervention in the

incident he was likely to be seriously beaten and, therefore, we find nothing unnatural that the witness straightaway reached at home instead of intervening in the incident.

Date 21.3.2006

27 By no stretch of reasoning witness Ketan could be said to be a chance witness as contended. It is contended that the presence of witness Ketan at the scene of offence is not natural and appears to be manipulated and hence he is a chance witness. As at the juncture of committing the offence, ordinarily, witness Ketan would not be present at the place of offence. Considering this contention, it must be observed that so far as our country is concerned, the concept of chance witness is foreign. In the matter of RANA PRATAP vs. STATE OF HARYANA, as reported in AIR 1983 SC, 680, in para-3, the Apex Court observed as under :

> " There were three eye-witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned counsel described both the independent witnesses as `chance witnesses' implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression `chance witnesses'. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is

committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that that they are mere `chance witnesses'. The expression `chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are `chance witnesses', even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence."

Therefore, when the offence has taken place on thoroughfare the presence of witness Ketan at the scene of offence, for the reasons stated by him, cannot be doubted.

28 While assessing the evidence of this witness, it is necessary to evaluate the manner in which he has deposed the incident. In para-2, the witness has deposed the occurrence of incident in simple manner. In para-3 of his deposition, he has mentioned that he was so frightened, therefore, he straightaway reached at home and did not disclose the names of the assailants. Crimes are events in real life and product of interplay of different human emotions. The court has to judge the evidence by the yardstick of probabilities and intrinsic worth of the say of the witness. Therefore, the reality of life have to be kept in mind while appreciating the evidence for arriving at the truth. Imagination,

phantasy and conjectures must not find place while appreciating evidence in criminal trials. The court cannot give latitude to the prosecution or loosely construe the evidence in favour of the accused. Considering the say of this witness, not only his conduct appears to be natural but simplicity and natural manner of deposing facts are sure guarantee of truthfulness of the witness. He withstood searching and lengthy cross-examination of defence counsels. Except mere suggestions made to him, nothing could be elicited in cross-examination particularly in respect of whatever the witness stated about the incident and for not disclosing names. We do not find any major contradictions in the evidence of this witness and this fact again lends credence to his say. Whatever contradictions are attempted to be brought on record, are not affecting the core of the prosecution case, which is evident from the evidence of P.I. Chandulal Popatlal Pandya, PW-17. In para-17 of his deposition, contradictions is proved in respect of leaving the place by the appellant and Shantaben in rickshaw, and in respect of the loan sanctioned to deceased Vinay. Except these two contradictions, no material variance could be brought on record . No improvement is found in the story narrated by this witness as contended. In this regard, this fact must be considered that disclosing the name of assailant late by itself is not fatal to the prosecution case. There may be many reasons for not going to the police immediately. Unless, the witness as well as Investigating Officer is given an opportunity to explain these circumstances, it cannot be said that late disclosure of the names of the assailant, is fatal to the prosecution case. It must be taken note of that young son of a family, aged about 25 years, was done to death.

Death stalks everyone without making any discrimination about criminals or ordinary persons. One has to visualize the set up when the incident occurred and circumstances thereafter. It would not be worry of anybody in the family to go to the police and give the names of attacker, and it would be quite natural on the part of family members to attend the injured, and in this case also, when Vinay had died, the whole family must have suffered the shock. It must be taken note of that it is not Ramaniklal, the father of the deceased, who went to the police station, but on information received by concerned police station, P.I. himself visited at the hospital and recorded the complaint of Ramanikbhai and, hence, in these circumstances, disclosing the name of appellant being assaulter, in the evening before the family members and before the police on the next day, in any manner, cannot be said to be the circumstance to doubt the prosecution case and particularly damaging the say of sole eye witness Ketan. On the contrary, it was quite natural for the above said reasons that after some time of incident when time is remedy of each pain and shock, after some hours, Ketan was in position to convey and describe the manner in which the incident occurred including the names of assailant. The trustworthiness and creditworthiness of the witness, can be ascertained from this aspect of the prosecution case. It must also be taken note that, had the intention of the father of the deceased and Ketan, to implicate appellant falsely, then, all of them had ample opportunities to implicate appellant earlier on the day of the incident and even when the complaint came to be recorded, but the prosecution witnesses have not availed of any opportunity to implicate appellant earlier

when this opportunity was easily available to them. Therefore, the contention that Ketan is a got up witness and not credit-worthy, cannot be accepted.

29 Thus, we find the evidence of Ketan unscathed on acid test of credibility and reliability. Moreover, his performance in the witness box is found worthy of credit by the trial court and trial court is satisfied about the reliability of this witness from his demeanour. Therefore, there is no earthly reason to disbelieve this eye witness Ketan even though he may be related to the deceased and he may be sole eye witness.

30 The testimony of Ketan is further corroborated by other witnesses i.e. PW-2 Ramnikbhai Desabhai, PW-3 Jayaben Ramaniklal, and PW-4 Manish Ramniklal. They are not the eye witnesses, but supporting witnesses. An attempt is made to bring on record some contradictions in the depositions of these 3 witnesses, but such contradictions are not material contradictions, affecting the core of the prosecution case, because the core of prosecution case is disclosed by witness Ketan, and in his deposition, no contradictions are found. Anyhow, the contradictions brought to the notice of this Court, in the evidence of PW-2 Ramaniklal Desabhai, PW-3 Jayaben Ramaniklal and PW-4 Manish Ramanilal, cannot affect the credit-worthiness and weighty evidence of witness Ketan. Further the say of the prosecution is corroborated by other witnesses i.e. PW-15 Champraj Najbhai, who shifted the dead body to the hospital and Investigating

Officer PW-17 Chandulal Popatlal Pandya, for the bloodstains found on lethal weapon recovered from appellant even though it could not be decided that those stains pertain to which blood groups. The fact remains that, through the evidence of the Investigating Officer Mr. Pandya, recovery of weapon from appellant is amply proved, so as to corroborate the ocular evidence of eye witness Ketan.

31 Dealing with other contentions raised on behalf of the appellant, it is noted that the defence of appellant as to he being physically handicapped to the extent of 45% disablement could not be established by the appellant by merely saying in further statement under Section 313 of the Code of Criminal Procedure. Appellant was required to lead evidence in this respect which he failed to produce. The xerox copy of the certificate issued at Exh. 3/2 is of no avail to the appellant as the same could not be proved. Further in the arrest panchnama Exhibit-32 it is noticed and as proved by PW-18 Nirmalsinh Kalyansinh Gohil, it becomes clear that there was no disablement as stated by the accused.

32 We are unable to accept the contention that because the case against Shantaben was not proved, the case against the appellant cannot be said to have been proved beyond doubt. While going through the evidence on record and the reasoning given by the learned Trial Judge, it becomes clear that the case against Shantaben and the case against present appellant stands on different footing and on different facts as well as on different roles attributed to each of those accused.

We do not have before us any acquittal appeal filed by the State for the acquittal of Shantaben and, therefore, we cannot enter into any further reasons in this regard, but suffice it to say that, the role played by appellant in the present incident came to be amply proved by the prosecution beyond any reasonable doubt and, hence, it cannot be said that the real accused of the quarrel i.e. Shantaben got acquittal and, therefore, the present appellant is also entitled to acquittal.

33 The contention that medical evidence does not support the prosecution theory has no merit at all. Ordinarily, it is the rule of law that medical evidence cannot be given precedence over the ocular evidence. This is so because witnesses are the eyes and ears of justice. Hence, the importance and primacy must be given to the ocular evidence, and it is not correct mode of appreciating the evidence, to keep the medical evidence constant, and to compare the ocular evidence with the ocular evidence . When eye witness is found credible and trustworthy, medical opinion pointing to alternative possibilities cannot be given any primacy over ocular evidence. Considering the facts of this case, it becomes clear that, as such, there is no conflict between the ocular evidence and medical evidence. The contention is, the iron rod blows given by the appellant to the deceased could not be supported by the medical opinion. There may be various reasons for not noticing such injuries by medical expert. There may be various reasons for noticing such blow by the witness in different manner on the body of the deceased and, therefore, it cannot be said that merely because the medical expert could not notice iron rod blows, the theory of

prosecution case becomes doubtful. The ocular evidence when tested for its inherent consistency and inherent probability of the story, the ocular evidence is found credit-worthy and the medical opinion cannot supersede such ocular evidence. It is also required to be noted here that the fatal blows found by Medical Officer are given by sharp cutting weapons and Medical Officer in his deposition also opined that such injury could be caused by weapons like knife. The ocular evidence of Ketan establishes that the appellant inflicted knife blows. Therefore, the medical opinion and evidence, on the contrary, corroborates the version of eye witness Ketan. Therefore this ground advanced by the appellant is not able to make any dent in the prosecution case.

34 Subsequent conduct of the accused appellant is hardly relevant so far as the facts and circumstances of this case is concerned. The contention is that the appellant found from his house on 22nd of May, 1997 easily to the police. Further contention is that this conduct indicates innocence on the part of the appellant. This contention cannot be accepted simply because the case against the appellant is established, as aforesaid, and secondly, it was never the case of the defence that right after the incident till the appellant was arrested, he was available to the police for arrest. This fact could not be elicited from any of the two investigating officers examined in this case. Likewise, the contention that the deceased was of a bad character and there were many criminal cases registered against him and on this count there were many enemies of the deceased, and they might have assaulted the deceased. This possibility advanced by the defence cannot be

probabilised through the evidence. These allegations remained in the shape of suggestions made to the witnesses and could not be taken further to establish that deceased was done to death by somebody else and not by the appellant. The question of considering this contention arises only when the prosecution case becomes doubtful and the probability of the defence is required to be considered, but as aforesaid, when a case against the appellant is proved beyond reasonable doubt, question of deceased being assaulted by somebody else than the appellant, does not arise at all.

35 We have gone through the decisions cited by learned Advocate for the appellant to support his contentions. Conclusion arrived at in above stated decisions is presented as precedents stating that the facts in the cited decisions and the facts of the present case are similar. In this respect, it must be observed that in criminal cases, the facts of one case cannot be the precedent for the other case and like wise conclusions arrived on such facts. The judicial pronouncements are made in the setting of the facts of the particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. It is more so in a case where conclusions relate to appreciation of evidence in a criminal trial. We have noticed that the conclusions arrived at in the decisions cited are arrived at on the facts of that case, and such facts cannot be compared with the facts of the present case. In the matter of PRAKASH CHANDRA PATHAK vs. STATE OF UTTAR PRADESH, as reported in AIR 1960 SC 195, in para 8, the Supreme Court observed as under :

" Learned counsel for the appellant cited before us a number of reported decisions of this Court bearing on the appreciation of circumstantial evidence. We need not refer to those authorities. It is enough to say that decisions even of the highest court on questions which are essentially questions of fact, cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well-established and beyond doubt or controversy. The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the Court. That question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It is no use, therefore, appealing to precedents in such matters. No case on facts can be on all fours with those of another. Therefore, it will serve no useful purpose to decide this case with reference to the decisions of this Court in previous cases. We have to determine whether on the facts and circumstances disclosed in the evidence which has been accepted by the courts below, the crime charged against the appellant has been made out. We have carefully weighed the facts and circumstances, pro and con forcefully brought to our notice by the learned counsel for the appellant and, in our opinion, no grounds have been made out for differing from the conclusions arrived at by the courts below. In our opinion, the facts and

circumstances proved in this case establish the guilt of the appellant beyond all reasonable doubt. The appeal is accordingly dismissed."

Further in the matter of CHARAN SINGH vs STATE OF PUNJAB, as reported in AIR 1975 SC 246, in para-32, the Apex Court observed as under :

" In the context of what value should be attached to the statements of the witnesses examined in this case our attention has been invited by the learned counsel for the appellants to a number of authorities. We have refrained from referring to those authorities because, in our opinion, reference to those authorities is rather misplaced. The fate of the present case like that of every other criminal case depends upon its own facts and intrinsic worth of the evidence adduced in the case rather than what was said about the evidence of witnesses in other decided cases in the context of facts of those cases. The question of credibility of a witness has primarily to be decided by referring to his evidence and finding out as to how the witness has fared in cross-examination and what impression is created by his evidence taken in the context of the other facts of the case. Criminal cases cannot be put in a straitjacket. Though there may be similarity between the facts of some cases, there would always be shades of difference and quite often that difference may prove to be crucial. The same can also be said about the evidence adduced in one case and that produced in

another. Decided cases can be of help if there be a question of law like the admissibility of evidence. Likewise, decided cases can be of help if the question be about the applicability of some general rule of evidence, e.g., the weight to be attached to the evidence of an accomplice. This apart, reference to decided cases hardly seems apposite when the question before the court is whether the evidence of a particular witness should be or should not be accepted."

36 Thus, appreciating the evidence as aforesaid, we come to the conclusion that unblemished testimony of Ketan is corroborated by other evidence, is rightly accepted by the Trail Court, to fasten the criminal liability upon the appellant. In normal circumstances, the appellate court would not be justified to review once again without justifiable reasons, the appreciation of evidence undertaken by the trial court, but we have also appreciated the evidence and considered each vital aspect of the case. We have taken totality of the situation in consideration including reasons given by the Trial Judge for convicting the appellant and we find that there are no reasons to interfere in the judgment and order of conviction and sentence impugned in this Appeal.

37 For the aforesaid reasons, in the result, this Appeal fails and is dismissed. Muddamal be disposed of as directed by the learned Trial Judge.

(J.M.PANCHAL, J.)

(J.R.VORA, J.)

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